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Journal Article

A Guide to Federal and Kansas Forfeiture

"WHEN GOOD PROPERTY GOES BAD" A PRIMER ON KANSAS ASSET FORFEITURE LAW AND PROCEDURE

[The] Police Power is an Inherent Power of the Sovereign and is Essential to Protect Members of the Community from Injury. It Rests upon the Fundamental Principle that all Property is Owned Subject to the Limitation that its use may be Regulated for the Safety, Health, Morals, and General Welfare of the Community in which it is Located.¹

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I. Introduction

We all try very hard to instill good values in our children, but how well are we doing with our property? Just when we think our Chevy Astro should know the difference between right and wrong, the telephone rings and we learn the police have seized our van for transporting cocaine. Who knows when it chose the wrong road. We knew it was in the garage at 10 P.M. every night. We changed the oil on time, splurged on premium unleaded and used the best mechanics money could buy. Maybe it was a factory defect. Or, more likely, it was the influence of that flashy red BMW convertible next door. Everybody knows BMW's are into drugs. That vixen! But, alas, blame matters little; the family ride is in jail and it needs a lawyer.

For thousands of years, governments have attempted to curb criminal behavior and protect society through the control of private property, whether it be a goring ox, an illegal brewery, a polluting oil refinery, an offending hog farm or a house where methamphetamine is packaged and stored for sale.² Though the right to private property is constitutionally protected,³ and in a southern court even termed a natural right,⁴ it has long been held that all property is subject to a government's police powers. Blackstone believed all property is derived from society, being one of those civil rights which are conferred upon individuals in exchange for that degree of natural freedom that every person must sacrifice when entering into social communities.⁵

Our founding fathers agreed. For example, Thomas Jefferson believed that at times private property must yield to the needs of society. Benjamin Franklin stated that individual property ownership exists and is protected only because of society's agreement that it be used to further the goals of society as a whole.⁶ The first Congress, the same men who sent the Bill of Rights to the states for ratification, passed the first federal forfeiture laws.⁷ The Kansas Bar Association wrote favorably on the topic calling it a "legitimate tool for law enforcement."⁸ Forfeiture laws in the United States and Kansas have consistently been found to be constitutional.⁹

The effort to control crime through the control of private property continues in Kansas today, embodied in the Kansas Asset Seizure and Forfeiture Act of 1994 (KSASFA), K.S.A. 60-4101 et seq. KSASFA not only confiscates criminal profits and property used to make crime easier, but it transforms those profits and property into new, additional law enforcement resources.

KSASFA is a supplemental civil remedy that is to be liberally construed by the courts for its remedial purposes.¹⁰ Used sparingly in this state, the act has the reputation of being one of the strongest yet most fair asset forfeiture legislation in the United States. Interestingly enough, the new federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), studied and argued over in Congress for years, finally adopted the same basic due process provisions that Kansas has had since 1994.¹¹

This article will briefly review the history of KSASFA, detail the life of a typical state forfeiture case, and then discuss the confusing difference between seizure of property for forfeiture and seizure of property under the Kansas Drug Tax Act. This overview is intended to provide only an introduction to the fascinating, yet intricate, Kansas forfeiture act. Attorneys required to practice in this area are forewarned to adjust their comfort level beyond the confines of this article.

***25 II. KSASFA's Heritage**

Kansas has had forfeiture laws since the territorial days.¹² Nuisance abatement was used and made famous when Carrie Nation smashed bars across the state.¹³ Such laws have been used in obscenity, liquor, cigarettes, prostitution, wildlife and environmental violations.¹⁴ Little wonder it was brought back to life in the drug war over twenty years ago.

By 1992, however, forfeiture was receiving a somewhat well-deserved reputation on the nation's coasts as being Draconian in both its lack of procedural safeguards and in its zealous use by law enforcement. Recognizing the approaching dust cloud of forfeiture problems, then Attorney General Robert Stephan appointed a special committee of forfeiture practitioners to review the state's forfeiture statutes and to recommend needed improvements.¹⁵

Following their year long study, the committee settled upon a complete overhaul of the vague, federal-model, Uniform Controlled Substances Act (USCA). Its proposed legislation, later little changed by the Legislature, was essentially the 1991 Model Asset Seizure and Forfeiture Act, tweaked with some important Kansas features and court decisions.¹⁶ Debated during two legislative sessions, KSASFA passed almost unanimously when brought to the respective floor votes at the end of the 1994 session.¹⁷

Simply put, KSASFA is a civil procedure that, in its *in rem* posture, sues the property for what the property has done wrong. There need not be any parallel criminal case or conviction involving a human being. The relief sought is remedial in nature because it seeks to turn the offending property away from its life of crime to one more beneficial to society. Some have argued that a criminal conviction should be necessary for property forfeiture. But criminals have already made that argument moot because they routinely place their property and proceeds in the names of "straw" owners who are certain not to be exposed to criminal charges. Further, in many cases, no person comes forward to claim seized property, especially cash, because of their fear of identifying themselves to criminal investigations or to tax problems with the IRS.

Just months ago, in Colby, Kansas, a fugitive drug dealer stopped for a traffic violation killed himself at the scene and police recovered \$3,700,000 in the trunk of his car. On the same day, Colorado authorities found another \$6,000,000 in a storage facility rented by the drug dealer in that state. The deceased drug dealer was, obviously, never convicted of the crimes involving the currency. Should the \$10,000,000 in illegal drug money go to the drug dealer's heirs, or to the taxpayers of Kansas and Colorado? Requiring a conviction to forfeit property may sound all warm and fuzzy, but as a practical matter it doesn't work very well.

Though beyond the scope of this article, KSASFA also contains a very interesting civil *in personam* provision,¹⁸ not to be confused with a federal criminal *in personam* complaint. State civil *in personam* actions most generally involve a state's attempt to recover money or other property no longer available for forfeiture by suing the individual who squandered it. In essence, the drug dealer has spent or sold the state's property and the state wants it back. In satisfying a judgment

the plaintiff law enforcement agency would be able to request the forfeiture of nontainted property owned by the in personam defendant, known as substitute assets.¹⁹

III. A Typical Kansas Forfeiture

*"Financial transactions are the engine that drives the violent, social, and economic effects of ongoing criminal networks. The participants must obtain personal profits and control the property and services needed to continue the activity."*²⁰

Since most Kansas forfeiture cases involve either cash or cars, this section will follow our unfortunate Chevy Astro van, in which we are all so disappointed, through its required behavior modification, or as it is better known, civil asset forfeiture proceedings.

A. The Seizure

Property subject to forfeiture in Kansas includes "anything of value ... any benefit, privilege, claim or right ... whether real or personal, tangible or intangible."²¹ That pretty much means everything, no matter its form, no matter its value. Forfeiture occurs for two bad property acts: if it is furnished, intended to be furnished, used or intended to be used to facilitate a covered offense, or it is the proceeds or derived from the proceeds of a covered offense.²² Covered offenses include drug crimes, gambling, money laundering, drive-by shooting, livestock theft and their related conspiracy, solicitation and inchoate crimes.²³

Property may be seized upon probable cause with or without a seizure warrant. No civil case need then be on file and seizure warrants may be obtained in the same manner as a search warrant. The district court has broad discretion and authority in the seizure and maintenance of *26 property, including custodianship and interlocutory sale of property should it be found a wasting asset.²⁴ The money from the interlocutory sale is then substituted for the original defendant-property.

Our Astro was seized on the public street by officers with probable cause to believe the van facilitated (transported, protected or somehow made easier) the possession of cocaine, a felony drug crime and an act giving rise to the van's forfeiture to society. The family's pride and joy was towed, hopefully ashamed, to a storage facility where it was administratively searched²⁵ and secured. Then, typically, when our Astro made its one phone call it called the BMW instead of its family.

1. Inquisition

Prior to the filing of a forfeiture action, a seizing agency and its civil plaintiff's attorney have certain investigative powers pursuant to K.S.A. 60-4118 and 60-4119, including inquisition and subpoena authority for testimony and records. A civil forfeiture inquisition proceeds much like a criminal inquisition under K.S.A. 22-3101(2). It is neither applied for nor directed by the district court. Real property investigations involve the filing of a Notice of Potential Claim on the property with the county register of deeds office by the law enforcement agency.²⁶ The Notice is not a lis pendens but is notice to a subsequent purchaser or mortgagee that they take their interest in the property subject to the law enforcement agency's prior interest through the relation-back doctrine.²⁷

B. Prior To Litigation

At any time, with county/district attorney (CA/DA) approval, a seizing agency may transfer a forfeiture matter to the federal government should the property have also offended federal law. KSASFA specifically allows such a transfer.²⁸ Some believe that local and state law enforcement agencies should not be able to transfer forfeiture matters to the federal government or a court order should be required for such authority. However, Kansas law enforcement agencies routinely transfer criminal cases to the federal forum and surely property shouldn't be given greater protection than that afforded citizens.

Upon seizing property, the seizing agency is required to make a reasonable effort to notify the owner.²⁹ A Notice of Seizure form is presented or mailed to the property owner by the seizing agency. The Notice gives information about the seizure, the seizing agency and the agency's contact person.

An owner can obtain return of the seized property four ways within a short amount of time:

1. Post a cash bond based upon the property's value.³⁰
2. Request and prevail in a probable cause hearing should the property have been seized without a judicial warrant.³¹
3. Reach a settlement with the seizing agency.³²
4. Convince the agency contact person that the property has a valid defense or is exempt from forfeiture.

In a state forfeiture, the seizing law enforcement agency acts as the plaintiff and its trust fund as the intended beneficiary. That agency decides whether to seize the property, return the property, settle the forfeiture claim, pursue the claim in state court or request federal adoption of the case assuming the property also offended federal law. The seizing agency also decides, in the status of a civil client, within guidelines, the attorney it will use and the percentage of attorney fees it will be willing to pay.³³

Attorneys for claimants to property should not immediately turn to the CA/DA in an effort to settle a forfeiture. Two problems may arise. The first occurs when there is a parallel criminal plea bargain and it is mixed with the civil forfeiture. KSASFA prohibits forfeiture settlements conditioned upon any disposition of criminal charges.³⁴ An ethical issue could also appear.³⁵

The second issue arises when claimant's attorney assumes the CA/DA inherently represents the seizing agency in a civil forfeiture. Because the seizing agency has sole authority to bring and guide a civil forfeiture, inherent CA/DA representation probably does not exist.³⁶ As a passing note, persons who, without authority, somehow interfere with a seizure or civil forfeiture are personally liable for any loss such interference caused.³⁷

Property seized for forfeiture is not subject to any collateral ***27** action,³⁸ alienation, conveyance, sequestration, attachment or a K.S.A. 22-2512 evidence return order from a criminal court.³⁹ Therefore, a claimant's attorney needs to

bring his or her clients' claims within the framework of KSASFA. By simply calling the seizing agency's contact person, counsel can easily find that the property has already been released, or is being held as evidence, has been transferred to a federal agency or, hopefully, is simply awaiting settlement. Good advocacy and negotiation skills will go a long way for a client in the days after a property seizure.

C. Settlement

The availability of settlement at any time during a forfeiture case is probably the most important point to be made in this article. Because state forfeiture cases are civil, any party may initiate the negotiations. Most seizing agencies are busy enough with other matters and are ripe for reasonable solutions. Retaining our Astro, that will surely leak fuel, oil, battery acid and transmission fluid all over the police department storage area, is not relished by the seizing agency.

All settlements, even those made prior to judicial filing, are to be in writing, approved by the CA/DA if involving a local agency or the Attorney General if involving a state agency, and reviewed by a district court judge.⁴⁰ It is notable here that KSASFA includes the CA/DA in many reviews, even when the CA/DA is not acting as plaintiff's attorney. The KSASFA drafting committee was very concerned that the CA/DA have some input into matters that could be detrimental to a pending criminal case. The district court's involvement is also important, especially in cases where a claimant does not have counsel.

D. Litigation - The Seizing Agency Files the Action

Unless otherwise provided for in KSASFA, the rules of civil procedure are controlling.⁴¹ The act sets out time lines, some mandatory, some directory.⁴² The statute of limitations for forfeiture actions is five years from the date of the property's last bad act.⁴³ Though most seizures for forfeiture are made at the time of the bad act, there are investigative reasons to wait such as undercover investigations or real property investigations.

Since our Astro was not also seized as evidence in the criminal cocaine case, the plaintiff's attorney should decide, within ninety days of the seizure for forfeiture, to file in the district court either an *in rem* Notice of Pending Forfeiture or an *in rem* judicial petition against the property.⁴⁴ The pleading will name the seizing agency as plaintiff, our Astro as defendant and copies will be provided by certified mail or personal service to all known potential claimants.⁴⁵

A Notice of Pending Forfeiture, used to reduce the court's time and resources, is a shortened petition stating the basic facts of the seizure and its sole job is to seek out claimants. Under new Supreme Court Rule 121, a Notice of Pending Forfeiture is to be filed with the court by the plaintiff's attorney. Should no one come forward to claim the seized property, a default judgment is entered. The filing of one or more timely and valid claims will require the plaintiff's attorney to file a judicial petition to adjudicate the claim(s). A copy of the judicial petition should be provided to the claimant(s) but no repetitive notice of the forfeiture action itself need be given. Sometimes, the plaintiff's attorney may decide from the facts of a particular case that claims will certainly be filed in the case and will chose to forego the Notice of Pending Forfeiture and file the judicial petition first.

Should the seizing agency fail to bring an action against our Astro within ninety days of its seizure, our family may demand the van returned, but we would hold it as a custodian of the court pending a plaintiff's filing. Contrary to what some claimants have argued, exceeding the ninety day time frame does not result in dismissal of the case, laches or estoppel.⁴⁶

E. Litigation - Claims

Claimants to seized property, usually owners and lien-holders, must file a written claim with copies to the court, the plaintiff's attorney and the seizing agency within thirty days providing all of the information, in affidavit form, required by K.S.A. 60-4111. So as not to require the posting of a cash claim bond, but at the same time prevent frivolous claims, KSASFA requires an up-front supportable showing by the claimant of the claimant's ownership interest and any exemptions or defenses to forfeiture. Failure to file a timely and sufficient claim will result in a default judgment. Pleadings such as a "general denial" answer fail to meet the statute's requirements and will be ripe for a motion to strike from the seizing agency.

Should one or more claimants with standing to contest the forfeiture properly appear, the next step is good, old fashioned, Chapter 60 civil discovery. Like other civil litigation, discovery will include requests for admissions, interrogatories, depositions and potential summary judgment. A stay in the proceedings may be requested by the plaintiff seizing agency should there be a parallel criminal matter pending.⁴⁷

***28 F. Litigation - Hearing**

A hearing on the forfeiture should be held within sixty days.⁴⁸ Juries are unavailable in state civil forfeiture trials. The seizing agency has the initial burden of proving the property is subject to forfeiture by a preponderance of the evidence. The burden then shifts to the claimant(s) to rebut the seizing agency's evidence, again by a preponderance.⁴⁹

Exemptions to state forfeiture are affirmative defenses and the burden of proving their existence is on the claimant.⁵⁰ Exemptions and defenses include: the property did not commit the alleged bad act, the real property is a homestead and the owner is innocent. The first is, of course, factual. The second is grounded in the Kansas Constitution⁵¹ but is not similarly protected in federal actions⁵² and the third is a statutory animal.⁵³

Plaintiff has put on its case and we have been unable to refute the van's facilitation of the crime. The court finds our Astro forfeitable. We are unable to provide a valid exemption to forfeiture. We wave goodbye to both our ol' trusty friend, and to the van's bank loan too. The seizing agency is required to pay off any outstanding liens.⁵⁴

Upon receiving the journal entry in the forfeiture case, the seizing agency, in its discretion, may use the property for official use, transfer the property to another agency for official use, or sell the property and place the proceeds in the agency's law enforcement trust fund. The seizing agency owes its attorney up to 20% of the value of the property, depending upon the prior fee agreement. To prevent conflicts of interest and targeting of certain property by law enforcement, no employee of a public agency (seizing agency, attorney firm, court personnel) involved in a forfeiture matter may purchase forfeited property.⁵⁵

Monies in the seizing agency's trust fund are to be used by the seizing agency for special, additional law enforcement purposes. Receipts in the fund may not be used to plan the seizing agency's regular budget nor to later fund normal operating expenditures.⁵⁶ Law enforcement agencies should keep state forfeiture, federal forfeiture and state drug tax receipts separately.⁵⁷ The expenditure of the funds must be made through the normal accounting procedures of the city or county. The agency is required to report its forfeiture receipts and expenses to its respective governing body once a year.⁵⁸

Public policy has been to dedicate forfeiture proceeds to additional law enforcement activities, recognizing that drug and forfeiture investigations are expensive and protracted. Some argue that law enforcement has an inherent conflict of interest because agencies will abuse forfeiture laws in an effort to obtain more and more forfeiture revenue. However,

in Kansas no one has been able to point to even one abuse by a law enforcement agency. In fact, KSASFA has built-in safeguards to prevent such abuses.

Should forfeiture proceeds be legislatively dedicated to non-enforcement agencies, many law enforcement agencies would be unable to reallocate other, non-forfeiture funding to the forfeiture investigations. Many agencies and governing bodies have come to rely upon forfeiture trust funds over the years for needed equipment and services. Will the funding now received from forfeiture be replaced if forfeiture proceeds are allocated to other services? What will the law enforcement agencies do if not?

One thing is for certain. If law enforcement agencies do not have sufficient funding to do the lengthy investigations of forfeitable offenses, forfeiture enforcement will probably dwindle to zero and the newly-designated recipients of forfeiture funds will see little if any revenue. In fact, what better, more clandestine, politically-protected way to stop active enforcement of forfeiture laws than to convince a legislature to divert forfeiture proceeds from the enforcement agencies to other, also worthy, drug treatment or education programs. The result in other states has been that no agency receives forfeiture proceeds because forfeiture investigations no longer occur.⁵⁹

IV. Drug Tax Confusion

All Kansas drug cases involve the seizure of property for one or more of the following reasons: temporary safekeeping, criminal evidence, dangerous chemicals or contraband, asset forfeiture and drug tax. Some seizures involve state and federal criminal, civil and administrative law and multiple enforcement agencies. Here we will be discussing the two most confused areas.⁶⁰ Asset forfeiture and drug tax share one, and only one, thing in common: the seizure of property.

As already discussed, forfeiture acts directly against the property, for what the property did wrong; it either facilitated a crime or it is the proceeds of a crime. Forfeiture law, at least initially, does not care who owns the property or who is or is not charged with a crime. It is enforced in civil court in an action brought by the seizing law enforcement agency.

*29 On the other hand, the Kansas Drug Tax Act (KDTA)⁶¹ acts against the person, for what the person failed to do: pay a state tax on his or her illegal drugs. The law requires persons planning to possess certain minimum quantities of illegal drugs to first purchase and then affix drug tax stamps to the illegal drugs.⁶² If found in possession of untaxed drugs, the taxpayer is subject to a felony criminal charge brought by the CA/DA; as well as the cost of the original stamp tax and a 100% administrative penalty assessed by the Kansas Department of Revenue (KDOR).⁶³

Generally, the property seized by KDOR is not the defendant. The seized property probably has done nothing wrong. The property is seized because it is owned by a taxpayer who fails to pay an assessment. Should the taxpayer settle the tax issue or prevail at an administrative hearing, the property seized in lieu of the tax will be released.⁶⁴

V. Summary

Asset forfeiture law is a mystical world. In Kansas it is a civil remedy and generally acts directly against property that has chosen to damage society through the legal fiction of personification. Through the forfeiture of property, the law redirects a property's use from evil to good again, it warns other property owners to take better care of their property, and it provides additional resources to law enforcement at no cost to the Kansas taxpayer.

Kansas forfeiture has been repeatedly reviewed since 1994 and has been found to be fair to the innocent, free from abuse and highly effective against crime, especially misbehaving Astro vans.⁶⁵

Footnotes

- 1 *Ray v. State Highway Commission*, 196 Kan. 13, 410 P.2d 278 (1966), *cert. denied* 385 U.S. 820.
- a1 **Colin D. Wood** is a KBI Senior Special Agent and has managed that agency's forfeiture and drug tax program since 1991. He served as secretary and member of the Attorney General's Task Force on Asset Forfeiture that authored the Kansas Standard Asset Seizure and Forfeiture Act, and he regularly teaches on the subject. Beginning his law enforcement career in 1973, he is a graduate of Wichita State University where he received his bachelors degree with honors, and later, a masters degree. He holds a J.D. from Washburn University School of Law and serves his community as its mayor, as chairperson of a local health foundation and as a local historian.
- 2 See generally: Walter W. Hyde, “The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times.”, *Univ. Penn. L.R.* 64 (1916): 696-730; Jacob J. Finkelstein, “The Goring Ox: Some Historical Perspectives”, 46 *Temp. L.Q.* 169 (1973); 1 Scott, *The Civil Law* 69 (1932) translating 7 Twelve Tables 1 of Roman Law.
- 3 16A *Am.Jur.2d Constitutional Law*, Section 346 (1998).
- 4 *Fitzhugh v. City of Jackson*, 132 *Miss.* 585, 97 *So.* 190 (1923).
- 5 1 William Blackstone, *Commentaries* *289.
- 6 See J. Anderson, “Takings and Expectations: Toward a ‘Broader Vision’ of Property Rights”, 37 *U.Kan.L.Rev.* 529 (1989).
- 7 Act of April 30, 1790, ch. 9 subsection 24, 1 *Stat.* 112, 117.
- 8 Ron Smith, former KBA General Counsel, “Legislative Information for the Kansas Legislature” memo dated February 17, 1993 concerning KSASFA, HB 2423 and directed to members of the House Judiciary Committee, pg. 1.
- 9 *U.S. v. Ursery*, 518 U.S. 267 (1996); *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974); *City of Hoisington v. \$2,044 in U.S. Currency*, ___ *Kan.App.2d* ___ (# 83,662), 8 P.3d 58 (2000).
- 10 K.S.A. 60-4123.
- 11 Including a preponderance standard, property release upon bond posting, definitive time frames, probable cause hearing, no cost and claim bond, attorney fees protection, disproportionality provision, and recognition of exemptions procedure.
- 12 Statutes of the Territory of Kansas, 1855, Chapter 3, Section 26, requiring the public burning of gaming tables.
- 13 *State v. Greer*, 164 *Kan.* 255, 188 P.2d 918 (1948).
- 14 *State v. Carr*, 114 *Kan.* 442, 218 P. 1007 (1923); *State v. Powell*, 120 *Kan.* 731, 244 P. 1053 (1926); See historically K.S.A. 22-3901 through 22-3904, 41-805, 21-2162, 32-1005(e)(1), and 32-1047.
- 15 A Report by Attorney General Robert T. Stephan's Task Force on Asset Forfeiture, 1993. Chairperson Kyle G. Smith.
- 16 Secretary's Notes, Attorney General's Task Force on Asset Forfeiture, 1992-1993. The Model Asset Seizure and Forfeiture Act (MASFA) was a product of an ad hoc committee made up of persons serving on a drafting committee for the National Conference of Commissioners on Uniform State Laws (NCCUSL). Following NCCUSL's inability to produce a model civil forfeiture act, the ad hoc committee, using Arizona state law as a framework, issued MASFA in 1991. MASFA has been adopted in Kansas, Georgia, Oregon, Louisiana, Arkansas, Hawaii and Iowa.
- 17 Senate and House Action Report and Subject Index Report, 1994. KSASFA passed the Kansas House of Representatives 117-5, and the Kansas Senate 38-1.
- 18 K.S.A. 60-4114.
- 19 K.S.A. 60-4115.

- 20 Cameron Holmes, Forfeiture Achieves Proper Purposes by Appropriate Means, 39 N.Y.L.Sch.L.Rev. 335 (1994).
- 21 K.S.A. 60-4102(p).
- 22 K.S.A. 60-4105.
- 23 K.S.A. 60-4104.
- 24 K.S.A. 60-4107.
- 25 *State v. Brickhouse*, 20 Kan.App.2d 495 (1995), *rev. denied*, concerning the finding of evidence of other crimes in vehicle seized for forfeiture and subject of inventory search.
- 26 K.S.A. 60-4118(f).
- 27 K.S.A. 60-4116(b).
- 28 K.S.A. 60-4107(j); 60-4108(a).
- 29 K.S.A. 60-4107(d).
- 30 K.S.A. 60-4108(b).
- 31 K.S.A. 60-4112(c).
- 32 K.S.A. 60-4107(k).
- 33 K.S.A. 60-4107.
- 34 K.S.A. 60-4107(l).
- 35 Though the Model Rules do not mention using a threat of criminal prosecution to gain an advantage in a civil matter, as does DR-7-105, KRPC 8.4(b) may well apply.
- 36 *See Dickerson v. KDOR*, 253 Kan. 850, 863 P.2d 364 (1993); *State v. Fehlhafer*, 23 Kan.App.2d 193, 930 P.2d 1097 (1996); K.S.A. 60-4102(m); KRPC 1.2(a).
- 37 K.S.A. 60-4115(b).
- 38 K.S.A. 60-4122.
- 39 K.S.A. 60-4108(a).
- 40 K.S.A. 60-4107(k).
- 41 K.S.A. 60-4112(q).
- 42 Where directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory. On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory. *Wilcox v. Billings*, 200 Kan. 654, 657, 438 P.2d 108 (1968); *State v. Residential Unit & Real Estate At 930 Windwood # 2, Junction City, Ks. 66441*, 26 Kan.App.2d 260, 983 P.2d 865 (1999).
- 43 K.S.A. 60-4120.
- 44 K.S.A. 60-4109(a).
- 45 K.S.A. 60-4109(a)(3).
- 46 K.S.A. 60-4109(a).

- 47 K.S.A. 60-4112(p).
- 48 K.S.A. 60-4113(g); *but see State v. Residential Unit*, 26 Kan.App.2d 260 *supra*.
- 49 *Id.*
- 50 K.S.A. 60-4112(h).
- 51 *State ex rel Braun v. A Tract of Land*, 251 Kan. 685, 840 P.2d 453 (1992); *but see* K.S.A. 60-4105(f) concerning real property purchased with criminal proceeds under the theory that homestead does not attach because the owner never gave consideration. A person cannot "own" the illegal proceeds of a crime.
- 52 *United States v. Walters*, 89 F.Supp. 1206, 1216 (D.Kan.2000).
- 53 *Bennis v. Michigan*, 516 U.S. 442 (1996).
- 54 K.S.A. 60-4106(a); 60-4117(c)(1).
- 55 K.S.A. 60-4117.
- 56 K.S.A. 60-4117(d)(3).
- 57 State of Kansas, Legislative Division of Post Audit, "Performance Audit Report: Seized Property in Kansas", August, 2000.
- 58 K.S.A. 60-4117(d)(3).
- 59 President's Commission on Model State Drug Laws, "Economic Remedies", December, 1993, pgs. A-24 and A-25.
- 60 *E.g. see State v. Yeoman*, 24 Kan.App.2d 639, 951 P.2d 964 (1997) wherein the Court discusses the Double Jeopardy Clause, drug tax and the "forfeiture" of drug-tax seized property.
- 61 K.S.A. 79-5201 et seq.
- 62 K.S.A. 79-5204.
- 63 K.S.A. 79-5208.
- 64 K.S.A. 79-5212.
- 65 *See* Kansas legislative House and Senate Judiciary Subcommittee hearing reports on Asset Forfeiture in 1993 and 1994; and a 1999-2000 statewide query by the Judicial Council Civil Code Advisory Committee on abuses or needed reform legislation concerning KSASFA resulted in two answers/questions: one was found unnecessary to pursue and the other resulted in new Supreme Court Rule 121 (September 6, 2000); and the legislative post audit report, FN 56, indicating only technical violations concerning the unwitting mixing of state drug tax, state forfeiture and federal forfeiture funds, and of failing to make annual reports on information readily available to the governing bodies in other local records. Further, the author attended the legislative post audit committee hearing accepting the forfeiture audit report. In answer to the question of a committee legislator concerning due process abuses, the post auditor answered that none had been reported and none had been found. For the opposite view *see* Kansas City Star special projects reporter Karen Dillon's series on forfeiture at www.kcstar.com during 2000. The author would caution, however, that legal and factual accuracy, at least as to KSASFA and Kansas forfeiture cases, are not highlights of the series.

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